APPENDIX.

ARIZONA REVISED CODE OF 1928.

607. BENEFIT SOCIETIES; LIMITATIONS. Associations may be formed for the purpose of paying to the nominee of any member a sum upon the death of said member not exceeding three dollars for each member of such association. No such association shall exceed in number, five thousand persons.

608. FORMATION. Such association shall be formed by filing a verified certificate in the office of the recorder of the county in which the principal place of business is to be situated, and filing a like certificate in the office of the corporation commission; such certificate shall state the general objects of the association, its principal place of business and the names of the officers selected to hold for the first three months, and shall be signed by the said officers and verified by at least three of them.

609. ASSESSMENTS. Said association, upon the death of any member, may levy an assessment, not exceeding three dollars, upon each living member, and collect and pay the same to the nominee of such deceased, and may also provide for annual assessments upon any one member not to be raised above that established at the time such member joined the association.

610. POWERS NOT CONTROLLED BY INSURANCE LAWS. Such association may sue and be sued by its name, may loan its funds and own sufficient real property for its business purposes, and such other real property as it may purchase on foreclosure of its mortgages. Such property so obtained through foreclosure shall be sold and conveyed within five years from the day title is obtained, unless the superior court of the proper county shall, upon petition

and good cause shown, extend the time. Such association may make such bylaws as may be necessary for its government and for the transaction of its business, and shall not be subject to the provisions of the general insurance laws.

CHAPTER 36, ARIZONA SESSION LAWS OF 1937.

Section 1. SHORT TITLE. This act may be cited as the benefit corporation law of 1937. (Now section 53-601, Arizona Code, 1939.)

Section 2. Section 607, Revised Code of 1928, is amended to read:

607. BENEFIT CORPORATIONS. Corporations, not for pecuniary profit, may be formed to provide cash benefits for members and cash benefits for the nominees of deceased members, and shall include all corporations, societies and associations operating an insurance business where funds are provided by mutual contributions, periodical payments, dues or assessments, except those hereinafter exempted. (Now section 53602, Arizona Code, 1939.)

Sec. 3. Sec. 608, Revised Code of 1928, is amended to read:

608. FORMATION. (a) Two hundred or more citizens of the United States, residents of this state for at least one year, may form a benefit corporation by filing articles of incorporation, verified by each of them stating the general objects of the corporation, its principal place of business, the time of its commencement and termination, the names of the directors and officers by whom the affairs of the corporation are to be conducted and the time of their election, the corporation's name (which shall indicate its general character of business and shall not closely resemble

the name of any association, life insurance company, or corporation now licensed to do business in this state), and whether private property is to be exempted from liability for the corporate debts. (Now section 53603 (a), A. C. 1939.)

(b) When the articles of incorporation have been thus filed and a certified copy thereof recorded in the office of the county recorder of the county in which its place of business is situated, and appointment of a statutory agent filed, the corporation commission shall issue the corporation a certificate of incorporation. (Now section 53-603 (b), A. C. 1939.)

Sec. 4. Article 3, Chapter 14, Revised Code of 1928, is amended by adding section 608a.

608a. MINIMUM MEMBERSHIP. Such corporation shall have twelve months from the date of its certificate of authority to secure a minimum of not less than five hundred members in good standing. Should the membership at any time fall below said minimum, the corporation shall immediately notify the corporation commission. Within ninety days thereafter, or such further time as the commission may allow, the corporation shall increase its membership to said minimum. If the corporation fails to increase its membership within the time fixed, the commission shall revoke its certificate of authority and thereupon such corporation shall liquidate and dissolve. (Now section 53-604, A. C. 1939.)

Sec. 5. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 608b:

608b. DEPOSIT OF MONEY OR SECURITY. (a) Every benefit corporation organized or operating under the provisions of this act, before receiving a certificate of authority to transact business, shall, in addition to the re-

quirements of section 609b, deposit with the state treasurer, to be by him held in trust for the benefit and protection of the corporation's members, the sum of one thousand dollars. Thereafter a further sum of one thousand dollars, divided into twelve equal monthly payments, beginning thirty days after the certificate of authority is issued, shall be likewise deposited with the state treasurer. Failure to pay any such monthly payments shall automatically cancel the corporation's certificate of authority. (Now section 53-605, A. C. 1939.)

(b) In addition to said deposits every such corporation shall, not later than February 1, 1940, and on or before February 1 of each year thereafter, deposit with the state treasurer, to be by him held in trust as hereinafter provided, for the benefit and protection of the members of the corporation, a further sum equal to one dollar for each one thousand dollars of protection in force on December 31 of the preceding year, beginning as of December 31, 1939, until a total of ten thousand dollars has been so deposited. (Now section 53-605 (b), A. C. 1939.)

(c) The deposits prescribed by this section shall be subject to withdrawal from the state treasury in whole or in part only on the order of and as directed by the corporation commission, but may, with the commission's approval, be invested in United States or state bonds, which shall be placed with and assigned to the state treasurer and held by him as provided for the original deposits. Subject to approval by the commission any such securities may be exchanged for others of like amounts. The interest on said securities shall be payable to the corporation depositing the same. (Now section 53-605 (c), A. C. 1939.)

(d) Any unsettled final judgment of a court of this state shall be a lien on the deposits of money or securities prescribed by section 608b, and subject to execution after thirty days from entry of final judgment. If said deposit is depleted thereby it shall be replenished within ninety days. (Now section 53-605 (d), A. C. 1939.)

(e) Said deposit may be considered as a part of any required reserve of the corporation and shall not be subject to withdrawal so long as the corporation has any contract or other liability outstanding. If and when the corporation liquidates, dissolves, or merges with another corporation, and there are no certificates or other liabilities not satisfied or assumed, the deposit shall be returned to the corporation upon the order of the commission, and placed to the credit of the fund from which it was taken or paid to the person who may have advanced it. (Now section 53-605 (e), A. C. 1939.)

Sec. ..... Article 3, Chapter 14, Revised Code of 1928, amended by adding section 608c:

608c. BENEFIT CERTIFICATE. (a) Every benefit certificate issued by any such corporation shall specify the maximum amount not exceeding five thousand dollars, on the life of any individual, to be paid on the happening of the contingency therein stated, and shall state the basis or amount to be set aside to the mortuary and reserve fund. The certificate, including any written amendment thereto, and, at the option of the corporation, the application therefor, and the by-laws of the corporation, shall constitute the entire contract between the corporation and the member, and the applicant shall see that all facts required to be stated are set forth in the application. (Now section 53-606 (a), A. C. 1939.)

(b) Each corporation shall provide in its certificate for at least fifteen days' grace following the due date of any periodical payment or dues, during which time the certificate shall not be forfeited. If payments are not made according to the terms of the certificate all liability of the member and of the corporation ceases, except as otherwise provided in the certificate. Any corporation may provide for a period of time, which shall be stated in the certificate, for the reinstatement of a lapsed or forfeited certificate, and for a reinstatement fee. If the corporation requires a written application for reinstatement such application shall be the basis of renewing the contract, and any statement made therein may be used by the corporation in defense of its rights under the certificate. (Now section 53-606 (b), A. C. 1939.)

Sec. 7. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 608d:

608d. FIDELITY BOND. The president, vice-president, or treasurer of every benefit corporation shall furnish a fidelity bond of a company authorized to transact business in the state, in the amount of five thousand dollars, payable to the corporation. (Now section 53-607, A. C. 1939.)

Sec. 8. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 608e:

608e. LIABILITY LIMITED. The private property of the officers, directors, members, beneficiaries, or employees of any benefit corporation organized under the provisions of this act shall not be liable for the payment of the debts of the corporation. (Now section 53-608, A. C. 1939.)

Sec. 9. Sec. 609, Revised Code of 1928, is amended to read:

609. PAYMENTS AND FUNDS. (a) Every benefit corporation shall provide in its benefit certificate for periodical payments or dues sufficient to pay benefit claims and general operating expenses as stipulated therein. (Now section 53-609 (a), A. C. 1939.)

(b) A mortuary and reserve fund, exclusive of other assets, may be created, out of which may be paid all benefit claims arising under the certificates, the deposits required to be made with the state treasurer as provided by section 608b, and attorney's fees and necessary expenses arising out of the defense, settlement, or payment of any contested or disputed claim. The residue of payments made by members, after setting aside the amount required for the mortuary and reserve fund, and interest earned by the assets of the corporation, whether deposited with the state treasurer or otherwise invested, may be used for general operating expenses. (Now section 53-609 (b), A. C. 1939.)

Sec. 10. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 609a:

609a. EXAMINATION. At least once in every two years the corporation commission shall require the books and affairs of each benefit corporation to be examined and audited by an accountant designated and commissioned by it, for the purpose of verifying the funds as provided in the benefit certificate thereof. For such purpose the commission and its auditor shall have free access to all books, papers and accounts of the corporation. The cost of any such examination and audit shall be paid by the corporation, but it shall not be required to pay for more than one such examination and audit in any one year, nor to exceed twenty-five dollars for each one thousand certificates or fraction thereof in force at the time of such examina-

tion except that a corporation chartered under the laws of another state shall also pay the traveling expenses of the accountant designated by the commission. All such costs shall be paid upon the completion of the audit or examination. (Now section 53-610, A. C. 1939.)

Sec. 11. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 609b:

Sec. 609b. CERTIFICATE OF AUTHORITY TO TRANSACT BUSINESS. (a) Before any benefit corporation shall solicit applications for benefit certificates it shall file a copy of its certificate with the corporation commission and evidence that it has made the deposit required by section 608c. If the certificate conforms to the requirements of this act, the commission shall within three days issue a written certificate of authority to the corporation to transact business. (Now section 53-611 (a), A. C. 1939.)

(b) Upon presentation to the commission of *prima facie* evidence that any benefit corporation is wilfully violating the provisions of this act, the commission shall immediately notify such corporation, stating the manner in which it is alleged the law is being violated. If it appears to the commission that the corporation is continuing such violation, it shall cite the corporation to appear within thirty days to show cause why the alleged violations should not be remedied. If upon said hearing the commission shall find that the corporation is violating the provisions of this act in the particulars stated in the citation, it shall serve a written notice of its decision upon the corporation, which shall be subject to the rights of appeal hereinafter provided. Should the corporation not appeal from such decision, or if it appeal the appellate court shall uphold the decision of the commission, the corporation shall comply with the order of the commission within ten

days thereafter, and upon its failure so to do, the commission may revoke the certificate of authority of such corporation. (Now section 53-611, A. C. 1939.)

Sec. 12. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 609c:

609c. EXEMPTION FROM ATTACHMENT. No money paid or to be paid for any benefit, as provided in a certificate issued by a corporation organized or operating under the provisions of this act, shall be liable to attachment or other process, nor may it be seized, taken, appropriated or applied by any legal or equitable process, nor by operation of law to pay any debt or liability of any member or his nominee, except as may be provided in the benefit certificate. (Now section 53-612, A. C. 1939.)

Sec. 13. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 609d:

609d. ORGANIZATIONS EXEMPTED. The provisions of this act shall not apply to secret or fraternal societies, lodges, or councils, which conduct their business and secure members on the lodge system exclusively, and having a ritualistic work and ceremonies in their societies, lodges, or councils, nor to any mutual or benefit association organized or formed and composed exclusively of members of any such society, lodge, or council, church or religious society, nor to any association of employees employed by one and the same concern, or its subsidiary, nor any labor organization, nor to any life insurance company labor organization, nor to any life insurance company organized or operating under chapter 36, Revised Code of 1928, nor to any foreign assessment company operating under the general insurance laws of this state. (Now section 53-613, A. C. 1939.)

Sec. 14. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 609e:

609e. No Vested Property Right. No member of a benefit corporation shall have any vested property right or title in any deposits or reserve during the life time of the member, other than as provided in the benefit certificate. (Now section 53-614, A. C. 1939.)

Sec. 15. Sec. 610, Revised Code of 1928, is amended to read:

610. Powers of Benefit Corporations. Any corporation organized under the provisions of this act may contract, sue and be sued by and in its own name, and shall not be subject to the provisions of the general insurance laws, and no law hereafter enacted shall apply to such corporations unless they are expressly designated therein. They may own sufficient real property for their business purposes and such other real property as they may purchase upon foreclosure of their mortgages. Property obtained through foreclosure shall be sold and conveyed within five years from the date title is obtained unless the superior court of the county in which the principal place of business of the corporation is located, shall, upon petition and for good cause shown, extend the time for such sale and conveyance. Such corporation may make and amend necessary by-laws, which shall provide for annual meetings of members who may vote in person or by proxy. The by-laws or the benefit certificate may provide for the qualification of members, mode of acceptance, the fees of admission and periodical payments or dues, the expulsion of members for non-payment of any periodical payment or dues, the restoration to membership, the employment and compensation of its agents and other regulations not in violation of this act. (Now section 53-615, A. C. 1939.)

Sec. 16. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610a:

610a. EXISTING CORPORATIONS. Any existing corporations under the provisions of sections 607, 608, 609 and 610, article 3, chapter 14, Revised Code of 1928, shall be deemed to be lawfully incorporated, organized and existing and may continue its corporate existence and transact business under, and avail itself of the provisions hereof without reincorporating or requalifying, except that such corporation shall, on or before January 1, 1938, comply with the provisions hereof as to statutory agent, minimum membership, deposits of money or securities, benefit certificate, fidelity bond, and certificate of authority, and shall be subject to examination as herein provided. (Now section 53-616, A. C. 1939.)

Sec. 17. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610b:

610b. FOREIGN ORGANIZATIONS. No benefit corporation, association, or society incorporated or transacting business under the laws of any other state or foreign country, shall transact business in this state until it complies with the requirements of this act. Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction punished by a fine of not more than five hundred dollars, imprisonment in the county jail for not more than six months, or both. (Now section 53-617, A. C. 1939.)

Sec. 18. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610c:

610c. FILING FEES. The fees for the filing of instruments and documents pertaining to the organization of

benefit corporations shall be the same as the fees provided for filing of like instruments and documents with the corporation commission. (Now section 53-618, A. C. 1939.)

Sec. 19. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610d:

610d. CONTESTABILITY. (a) All certificates issued by a benefit corporation shall be incontestable after three years from their effective date or three years from the effective date of any reinstatement after lapse, except for non-payment of assessment levied.

(b) To contest the validity of a certificate, or deny liability thereunder, the corporation shall notify the member, or if the member is dead, the beneficiary, by registered letter addressed to such member or beneficiary at the last address known to the corporation. (Now section 53-619, A. C. 1939.)

Sec. 20. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610e:

610e. APPEAL. Any decision of the corporation commission may, within sixty days after the same has been served on a benefit corporation, be appealed to the superior court of the county in which the principal place of business of such corporation is located. Notice of appeal and a statement of objection to the commission's decision shall be filed with the commission, which shall, within sixty days after the appeal has been filed, transmit a copy of such notice and statement, with a certified copy of the proceedings before the commission, including a transcript of testimony and all exhibits, to the clerk of the superior court, who shall docket the appeal in the name of the

appellant as plaintiff and the corporation commission as defendant. The superior court shall hear such appeal, with or without jury, unless both parties shall file an agreement to a continuance. Either the corporation commission or any such corporation or proposed corporation may appeal from the judgment of the superior court to the supreme court. (Now section 53-620, A. C. 1939.)

Sec. 21. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610f:

610f. PENALTIES. Any solicitor, agent, examining physician, or other persons who wilfully makes any false or fraudulent statement or misrepresentation in or with reference to any application for benefit or for the purpose of obtaining any money or benefit in or to any corporation transacting business under this act, or any officer of any such corporation who refuses to permit the corporation commission or its auditor to make an examination and audit of the business, books, or records of such corporation, or who wilfully violates any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by fine of not more than five hundred dollars, imprisonment in the county jail not more than six months, or both. (Now section 53-621, A. C. 1939.)

Sec. 22. SEVERABILITY. If any provision of this act be held invalid, such invalidity shall not affect other provisions which can be given effect without the invalid provision, and to this end the provisions of the act are declared to be severable. (Now section 53-622, A. C. 1939.)

[Key, reading: West Key Number System.]

FIRST NAT. BEN. SOC. v. STUART.
No. 10231.

Circuit Court of Appeals, Ninth Circuit. March 8, 1943.

As Modified on Denial of Rehearing. April 12, 1943.

1. INTERNAL REVENUE ⇐ 2168

In action by a benefit society to recover income taxes paid, evidence sustained finding that the society did not maintain reserve for fulfillment of insurance contracts as required in order to qualify as a life insurance company within Revenue Act. Rev. Code Ariz. 1928, §§ 607-610; Revenue Act 1936, § 201, 26 U. S. C. A. Int. Rev. Acts, p. 898.

2. INTERNAL REVENUE ⇐ 826

Where benefit society did not maintain reserve for fulfillment of insurance contracts as required by treasury regulations to qualify as a life insurance company within Revenue Act, the benefit society was not taxable as a "life insurance company" but was taxable under Revenue Act imposing tax on "mutual insurance companies other than life." Rev. Code Ariz. 1928, §§ 607-610; Revenue Act 1936, §§ 201, 207, 26 U. S. C. A. Int. Rev. Acts, pp. 898, 902.

See Words and Phrases, Permanent Edition, for all other definitions of "Life Insurance Company" and "Mutual Insurance Company Other Than Life."

3. INTERNAL REVENUE ⇦ 153

Treasury regulation requiring the maintenance of reserve in order for insurance company to qualify as life insurance company within Revenue Act was not objectionable as illegal legislation where Revenue Act regarding life insurance companies was originally enacted in 1921 and successive regulations had been substantially similar since under circumstances congress was taken as having approved the administrative construction and thereby to have given it the force of law. Revenue Act 1936, § 201, 26 U. S. C. A. Int. Rev. Acts, p. 898.

4. INTERNAL REVENUE ⇦ 157

Revenue Act section defining a life insurance company as an insurance company engaged in business of issuing life insurance the reserve fund of which held for fulfillment of contracts comprised more than 50 per cent of its total reserve fund is ambiguous and justified treasury regulation regarding reserve which must be kept to qualify as a life insurance company. Revenue Act 1936, § 201, 26 U. S. C. A. Int. Rev. Acts, p. 898.

Upon Appeal from the District Court of the United States for the District of Arizona; Dave W. Ling, Judge.

Action by the First National Benefit Society, a corporation, against W. P. Stuart, Collector of internal revenue, to recover income taxes paid. Judgment for defendant, and plaintiff appeals.

Affirmed.

Robert R. Weaver, of Phoenix, Ariz., for appellant.

Samuel O. Clark, Jr., Asst. Atty. Gen., Sewall Key, Samuel H. Levy, Paul R. Hussell, and Louise Foster, Sp. Assts. to Atty. Gen., and Frank E. Flynn, U. S. Atty., of Phoenix, Ariz., for appellee.

Before Garrecht, Haney and Healy, Circuit Judges.

Haney, Circuit Judge.

Appellant sought, but was denied, recovery of income taxes alleged to be illegally exacted from it for the years 1936 and 1937, and appeals from the judgment entered in favor of appellee.

Appellant was organized under the laws of Arizona on March 29, 1934. The Articles of Incorporation provide: "That the objects and purposes for which said Corporation is formed are: To engage in, conduct and carry on the business and customary activities of a mutual benefit association within the meaning and provisions of Sections 607-608-609-610 of Chapter 14 of Article 3 of the 1928 Revised Statutes of the State of Arizona as the same now exists. * * *"

Appellant's by-laws classify its funds into three classes, although the distinction between two of them is not clear. It issues contracts of life insurance. It assesses members

to procure funds to meet claims under the contracts. Its financial statements show a very small amount of assets, but no liabilities. In other words, there was no ordinary balance statement showing assets and liabilities. Thus, these statements, being only half of the usual balance statement, disclose no reserves whatever. Such reserves as are commonly held as representing the value of the life insurance elements of the policy, are customarily shown as a liability, but appellant discloses no liabilities.

Appellant did submit operating statements which show that its receipts were classified into the various funds mentioned, but while a few show a surplus of receipts over expenditures, none of them shows that any part of such receipts were used to set up a reserve fund of any kind. Those which show a small surplus, the amount is carried in the "Asset" balance statement as such. Otherwise, the operating statements disclose that all receipts were used to pay claims and expenses. In its income tax returns for 1936 and 1937, appellant reported no tax liability but attached to the returns the statement that "The entire income consists of amounts collected from members for the sole purpose of meeting losses and expenses."

The Commissioner of Internal Revenue audited the returns and assessed tax deficiencies for both years on the theory that appellant was not a life insurance company within the meaning of § 201 of the Revenue Act of 1936, 26 U. S. C. A. Int. Rev. Acts, page 898, and it was therefore taxable under § 207 of that act. Appellant paid the tax, claimed a refund, and after denial of its claims brought this action to recover the tax paid. The court below found that appellant did not voluntarily keep, and no statute, rules or regulations promulgated in the exer-

cise of a power conferred by statute required it to keep, a reserve fund for the fulfillment of its insurance contracts. The court below concluded that appellant was not a life insurance company within the meaning of § 201 of the Revenue Act of 1936, and entered judgment for appellee. This appeal followed.

Appellant contends that it is not taxable because it is a life insurance company within the meaning of § 201 of the Revenue Act of 1936 which defines what is meant in that part of the act by the term "life insurance company" as "an insurance company engaged in the business of issuing life insurance and annuity contracts * * * the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds."

Art. 201 (a)-1, Treasury Regulations 94, provides that "no reserve shall be regarded as held for the fulfillment of an insurance contract unless it conforms to the definition of 'reserve' contained in article 203(a) (2)-1." The latter article provides in part as follows: "In general, the reserve contemplated is a sum of money, variously computed or estimated, which, with accretions from interest, is set aside (reserved) as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims. It must be required either by express statutory provisions or by rules and regulations of the insurance department of a State, Territory, or the District of Columbia when

promulgated in the exercise of a power conferred by statute. * * *

"* * * A company is permitted to make use of the highest aggregate reserve called for by any State or Territory or the District of Columbia in which it transacts business, but the reserve must have been actually held. * * *"

[1, 2] Appellant contends that the finding of the court below, that it maintained no reserve for the fulfillment of insurance contracts, is not sustained by the evidence. We think the finding is the only one possible under the evidence. The evidence goes no further than to show that appellant classified its income, but classifying income is not maintaining a reserve. Likewise, a requirement of the by-laws requiring maintenance of reserves does not show that appellant maintained such reserves.

[3, 4] The statute, itself, does not expressly require a reserve before a company can be considered a "life insurance company." Likewise it does not say that if reserves are kept, they must be of the kind which are required by statute. However, the statute does not provide to the contrary either. The regulations require a reserve, and the kind of reserve specified by the state statutes or regulations promulgated thereunder. Appellant argues that the regulations, in so defining, if not limiting, the scope of the statute, have illegally legislated by changing the classification of tax payers. It is not argued that Congress could not have done what the regulations did, but it is argued that Congress has not done so.

The statute as quoted above was originally enacted in 1921. It has existed since without change. The successive regulations have been substantially similar. Under these circumstances "Congress must be taken to have approved the administrative construction and thereby to have given it the force of law." Helvering v. Raynolds Co., 306 U. S. 110, 115, 59 S. Ct. 423, 426, 83 L. Ed. 536. See, also, Helvering v. Winmill, 305 U. S. 79, 83, 59 S. Ct. 45, 83 L. Ed. 52, and cases cited in note 7. Appellant maintains that the statute is unambiguous, and that it comes within its plain terms, and therefore the regulations cannot limit the statute. We do not regard the statute as unambiguous. The statute itself certainly does not make it clear whether any reserve must be kept, and it does not make it clear that if reserves are kept they must or must not be of the kind required by state law to be kept. While it might be possible to look at various provisions of the act and its legislative history, and thus determine what Congress should have meant in logic, we are not determining what Congress should have meant, but what it actually meant.

Affirmed.

In the United States Circuit Court of Appeals for the Ninth Circuit.

First National Benefit Society, a corporation, Appellant, vs. W. P. Stuart, Collector of Internal Revenue, Appellee. No. 11,039. Dec. 11, 1945.

Appeal from the District Court of the United States for the District of Arizona.

Before GARRECHT, MATHEWS and HEALY, Circuit Judges. MATHEWS, Circuit Judge.

For the calendar year 1938, appellant filed an income tax return which disclosed no income nor any income tax liability. The Commissioner of Internal Revenue determined that appellant was a mutual insurance company (other than a life insurance company) within the meaning of § 207(a) of the Revenue Act of 1938,[1] 26 U. S. C. A. Int. Rev. Acts, p. 1092, and hence was taxable under that section, and that it had special class net income of $10,139.48 in 1938 and hence owed a tax of $1,673.01 (16½% of $10,139.48). The tax was assessed by the Commissioner and was collected by appellee, Collector of Internal Revenue for the District of Arizona. A claim for refund was duly filed with the Commissioner. No decision thereon having been rendered within six months from the date of such filing, appellant brought a suit against appellee for the recovery of the tax.[2] Appellee answered, trial was

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[1]Section 207(a) provides: "There shall be levied, collected, and paid for each taxable year upon the special class net income of every mutual insurance company (other than a life insurance company) a tax equal to 16½ per centum thereof." For the meaning of the term "special class net income," see § 14(a) of the Revenue Act of 1938, 26 U. S. C. A. Rev. Acts, p. 1006.

[2]26 U. S. C. A. Int. Rev. Code, § 3772.

had, findings of fact and conclusions of law were stated, and judgment was entered in favor of appellee. From that judgment this appeal is prosecuted.

Appellant alleged, in substance and effect, that it was a life insurance company within the meaning of § 201(a) of the Revenue Act of 1938,[3] 26 U. S. C. A. Int. Rev. Acts, p. 1087, and hence was not taxable under § 207(a). Appellee denied that appellant was a life insurance company within the meaning of § 201(a). On this issue, appellant had the burden of proof.[4] Thus appellant had the burden of proving that it was engaged in the business of issuing life insurance and annuity contracts, and that its reserve funds held for the fulfillment of such contracts comprised more than 50% of its total reserve funds.[5] The burden was not sustained. The court properly concluded that appellant was not a life insurance company within the meaning of § 201(a).[6]

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[3]Section 201(a) provides: "When used in this title [§§ 1-373 of the Revenue Act of 1938, 26 U. S. C. A. Int. Rev. Acts, pp. 1001-1129] the term 'life insurance company' means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds."

[4]United States v. Anderson, 269 U. S. 422; United States v. Mitchell, 271 U. S. 9; Botany Worsted Mills v. United States, 278 U. S. 282; Reinecke v. Spaulding, 280 U. S. 227; McLaughlin v. Pacific Lumber Co., 293 U. S. 351; Welch v. St. Helens Petroleum Co., 9 Cir., 78 F. 2d 631; Obispo Oil Co. v. Welch, 9 Cir., 85 F. 2d 860; Parrott Estate Co. v. McLaughlin, 9 Cir., 89 F. 2d 189; Maloney v. Western Cooperage Co., 9 Cir., 103 F. 2d 992; United States v. Trust No. B. I. 35, 9 Cir. 107 F. 2d 22; Powell v. United States, 9 Cir., 123 F. 2d 4572; Cranson v. United States, 9 Cir., 146 F. 2d 871.

[5]See footnote 3.

[6]Cf. First National Benefit Society v. Stuart, 9 Cir., 134 F. 2d 438.

Appellant alleged, in substance and effect, that, if taxable under § 207(a), it was entitled to a deduction under § 207(c)(3) of the Revenue Act of 1938,[7] 26 U. S. C. A. Int. Rev. Acts, pp. 1092, 1093. Appellee denied that appellant was entitled to any such deduction. On this issue, appellant had the burden of proof.[8] Thus appellant had the burden of proving that its members were required to make premium deposits to provide for losses and expenses and that some amount thereof was returned to its policyholders or was retained for the payment of losses, expenses and reinsurance reserves.[9] The burden was not sustained. The court properly concluded that appellant was not entitled to a deduction under § 207(c)(3).

Judgment affirmed.

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[7]Section 207(c) provides:

"(c) Deductions.—In addition to the deductions allowed to corporations by section 23 the following deductions to insurance companies shall also be allowed, unless otherwise allowed—

"(3) Mutual insurance companies other than life and marine. —In the case of mutual insurance companies (including interinsurers and reciprocal underwriters, but not including mutual life or mutual marine insurance companies) requiring their members to make premium deposits to provide for losses and expenses, the amount of premium deposits returned to their policyholders and the amount of premium deposits retained for the payment of losses, expenses, and reinsurance reserves."

[8]See cases cited in footnote 4.

[9]See footnote 7.

(Endorsed.) Opinion. Filed Dec. 11, 1945. Paul P. O'Brien, Clerk.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1946.

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4-2-46—60